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No. 95-896

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WASHINGTON SERVICE CONTRACTORS COALITION, *et al.*,
Petitioners,
v.
DISTRICT OF COLUMBIA, *et al.*,
and
SERVICE EMPLOYEES INTERNATIONAL UNION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARSHA S. BERZON
(Counsel of Record)
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
BRUCE MILLER
ORRIN BAIRD
CAROL R. GOLUBOCK
1313 L Street, NW
Washington, DC 20005
Attorneys for Service Employees International Union, et al.

CHARLES F. C. RUFF
Corporation Counsel, D.C.
CHARLES L. REISCHEL
(Counsel of Record)
Deputy Corporation Counsel
Appellate Division
Office of the Corporation Counsel
One Judiciary Square
441 Fourth Street, NW
Washington, DC 20001
(202) 727-6252
Attorneys for District of Columbia, et al.

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RESPONDENTS' BRIEF IN OPPOSITION

The decisions below, statutes involved and basis for jurisdiction are accurately stated in the Petition for Writ of Certiorari (at 1-2).

STATEMENT OF THE CASE

A. *The Statute:* The basic premise of the Petition for Writ of Certiorari is that the District of Columbia Displaced Worker Protection Act of 1994 ("DWPA"), D.C. Code Sections 36-1501 to 1503, "imposes on employers an obligation to bargain with the labor union that represented the predecessor's employees." Petition for a Writ of Certiorari (Pet.) at 3. The DWPA does no such thing.

The DWPA applies without regard to whether the covered employees are union represented or not, and alleviates the impact of contract turnover on low wage workers

employed in certain contract service industries such as janitorial and food services, and on the District's social services and unemployment compensation budgets, by providing these low-skilled workers a limited opportunity for continued employment.

Hearings held by the D.C. City Council before enacting the DWPA revealed that because of the labor intensive nature and low capital requirements of these service industries contracts frequently turn over, and that when a service contractor loses a contract its workers generally lose their jobs with that employer. Appendix filed in the Court of Appeals ("App."), at 81, 120. This continuous turnover has a great impact on the District's unemployment compensation system. The District's Department of Employment Services stated during the statute's consideration that the DWPA, if enacted, "could significantly impact the reduction of the number of unemployed D.C. residents currently collecting unemployment benefits in the job categories covered by the bill." App. at 80-83.

The DWPA provides that, when a covered employer is awarded a contract to perform "similar covered services" previously provided by another contractor, the covered employer must retain covered employees of its predecessor "for a 90-day transition employment period". D.C. Code §§ 36-1503(b). The new contractor may establish its own terms of employment, *see*, D.C. Code §§ 36-1502, and is specifically authorized "at anytime, [to] determine[] that fewer employees are required to perform the new contract than were required by the previous contractor." D.C. Code §§ 36-1502(c).

The statute explicitly allows discharge for cause during the transition period. D.C. Code §§ 36-1502(e). Further, when the transition period ends, the contractor is required only to do a performance evaluation to determine if the employee has performed satisfactorily and should continue to be retained. D.C. Code §§ 36-1502(f). Persons employed in managerial and other positions exempted from coverage under the Fair Labor Standards

Act, 29 U.S.C. § 213(a)(1), are specifically excluded from coverage under DWPA. *Id.*

B. *Proceedings:* Less than one month after the DWPA took effect, Petitioners, an association of building service contractors and some individual contractors ("the contractors"), filed suit against the District of Columbia ("District") in federal District Court. The district court enjoined the DWPA as preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., for two separate reasons: First, insofar as the DWPA applies to supervisors, "the DWPA's application to supervisors [was] enjoined" as violative of NLRA § 14(a), 29 U.S.C. § 164(a)," Pet. App. 30a-31a; and second, the DWPA "as a whole" was declared preempted as "an unprecedented incursion into an area that was previously unregulated." Pet. App. 38a.

The District and the Intervenor Union appealed the district court's broad ruling that the DWPA as a whole is preempted, but did not appeal the first, narrower aspect of the judgment, pertaining only to supervisors.[1] On appeal, the Court of Appeals for the D.C. Circuit reversed.

Unanimously, the court below rejected the contractors' contention that the district court's injunction must be sustained in its entirety on the basis of that court's ruling concerning supervisors. Pet. App. 6a-7a; Pet. App. 14a. The court of appeals also rejected, 2-1, the district court's broad NLRA preemption ruling. The majority explained

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[1] The District and the Unions noted that, in their view, the DWPA would apply to few if any NLRA supervisors, and would not require that those individuals be hired as supervisors or protect supervisors from discharge because of their union affiliation. Because the DWPA therefore accords minimal protection to supervisors and is instead intended to protect rank-and-file employees, the present respondents determined that it would simplify the further consideration of this case to accept the district court's ruling with respect to NLRA "supervisors" only. Brief for Appellants, at 7-8.

that the contractors' preemption contention, based principally upon the possibility that, where the predecessor employer's workforce is represented by a union for purposes of collective bargaining the successor will be obliged under the NLRA to recognize that union and bargain with it, "contains a logical flaw" (Pet. App. 9a):

> [W]here the employer has been required by local law to hire a majority of its predecessor's employees, the NLRB may or may not impose successorship obligations on the new employer. We will not know until the NLRB addresses the issue. At that time, if the NLRB determines that the successorship doctrine does not apply, appellees' alleged "conflict" will disappear. On the other hand, if the NLRB—the body to who Congress has entrusted the evolution of federal labor policy [citation omitted]—determines that the successorship doctrine should apply to such circumstances, it is difficult to see how appellees could argue that the result would invoke 'conflict' between the DWPA and the NLRA. [Pet. App. 9a.]

And the Court of Appeals, in reliance on *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), held that the NLRA does not broadly preempt state laws concerning hiring decisions generally, any more than it does other state employee protective legislation. Pet. App. 10a-11a. Finally, the D.C. Circuit rejected the contention that the DWPA is invalid under the Contracts Clause. Pet. App. 12a. Judge Sentelle dissented as to the broad NLRA preemption argument only. Pet. App. 14a-16a.

ARGUMENT

The preemption issue decided by the Court of Appeals in this case is, by petitioners' own admission, *sui generis* and on that basis alone is uncertworthy. Pet. 6 ("no state or local jurisdiction has ever passed a law like the DWPA); Pet. 24 ("the DWPA is unique").[2] This

[2] We do not know of any *state* statutes similar to the DWPA. (There are, however, various federal statutes that provide hiring

Court does not sit to correct error in a case which has no impact at all beyond the borders of the District of Columbia.

Beyond that—if more be needed—the Court of Appeals' rejection of petitioners' NLRA successorship law preemption argument rests primarily on the unexceptionable grounds that petitioner's argument is marred by a fundamental "logical flaw," and that petitioner's argument is in addition squarely refuted by this Court's decision in *Metropolitan Life Ins. Co. v. Massachusetts, supra.* And, the Court of Appeals' timeliness ruling—that it is premature to consider petitioner's substantive contention concerning whether the NLRA permits imposition of a bargaining obligation on a successor employer absent a conscious decision by that employer to hire a majority of its predecessor's employees—likewise raises no legal question of substance for this Court. Finally, petitioners' severability and Contract Clause arguments are, as the Court of Appeals indicated, entirely without basis.

1. The Petition at pp. 7-9 would have it that the DWPA by its terms creates labor law "successors," required to bargain with any union representing their predecessor's employees. The DWPA, however, does *not* itself impose any bargaining obligation. Rather the DWPA applies across the board, where the predecessor was organized or where the predecessor was unorganized, and simply establishes "minimum labor standards [that] affect union and nonunion employees equally." *Metro-*

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protection for employes. *See* p. 9, *infra.*) Contrary to Petitioners' suggestion (Pet. 6 n. 3), *Cannon v. Edgar*, 33 F. 3d 880 (7th Cir. 1994) involved a state statute bearing no resemblance to the DWPA. That statute required that employers and unions in certain circumstances designate which employees would work in the event of a strike. The Seventh Circuit held that statute preempted not because of any interference with a supposed employer "freedom to hire", but because that statute is inconsistent with federal labor law principles protecting the right to strike and precluding imposition of the terms of a collective bargaining agreement.

politan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985), *quoting Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981).

Equally to the point, the NLRA does not in terms address the circumstances under which a successor employer must bargain with the union that represented the employees of its predecessor. Instead, NLRA successorship doctrine has evolved over time through NLRB and court decisions on how the NLRA system for determining questions of representation is affected by changes in the employing entity. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-41 (1986). The most that can be said with any certainty regarding that doctrine is that generally an employer who hires as a majority of its workforce the predecessor's employees is obliged to bargain collectively with the union, if any, representing its predecessor's employees. *Fall River*, 482 U.S. at 46.

The salient point here, however, is that *no* Board or court case has addressed the question whether the same result would follow if the successor hired its predecessor's employees because the successor was obliged by law to do so, rather than because it voluntarily chose to do so.

Petitioners would fill this void with the prediction that when that issue is reached, the Board and the courts will conclude that employers covered by the DWPA will incur a bargaining obligation because of the mandatory retention of the predecessor's employees. At the same time, the contractors maintain that imposing such an obligation will be inconsistent with the NLRA because the NLRA successorship doctrine permits impostion of bargaining obligations only where the employer has made a "conscious decision . . . to hire a majority of its employees from the precedessor." Pet. 13, quoting, *Fall River Dyeing*, 482 U.S. at 41, Pet. 13.

As the court below recognized, this argument is on its face a mass of internal contradictions. If the second part of the argument is correct—if, as the contractors in this

case insist, the NLRA affirmatively protects successor employers' free market right of self-determination in hiring—then the NLRB and the courts will *not* require employers to bargain collectively where they did not voluntarily undertake to hire a majority of the intact workforce.[3] The contractors' confident prediction that they will be treated as NLRA successors if the DWPA remains in place and their insistence that such treatment would be inconsistent with the premises of the NLRA successorship doctrine cannot both be true.[4] And, since the DWPA

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[3] We hasten to add that we do not believe that the successor doctrine *does* rest on any "right" of employers to make a conscious choice to hire their predecessors employees. For present purposes, however, the issue is not whether or not the contractors are correct in that premise, but whether the courts should decide the question in the present preemption context rather than on appeal from an NLRB decision.

[4] Petitioners' two responses to the foregoing are perfunctory. First, the contractors maintain that leaving the question of the impact of the DWPA on the bargaining obligations of successor employees to the NLRB could, if the Board agrees with petitioners' *own arguments* concerning the central role of voluntary employer hiring decisions in the successorship doctrine, result in a "harmful impact . . . on *employees'* rights: the employees would be deprived of their chosen collective bargaining representative, a result inimical to federal labor policy." Pet. 14. But, again, if the NLRB and the courts reached that conclusion, it would be on the basis that the result is *not* one "inimical to federal labor policy."

Second, the contractors suggest that the DWPA is preempted, without more, because in any ensuing NLRA successorship litigation involving a DWPA-covered employer, the NLRB may have to take the impact of the DWPA into account in determining the appropriate balance between employee representation and employer autonomy in a successorship situation. But state law often forms the "backdrop" against which federal NLRA rights operate (*Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987, *quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985)). Where state law protects employees or employers without regard to the existence of a labor dispute or the existence or nonexistence of union representation in a workplace, the fact that such rules may have some impact upon how the NLRA regime operates has never been a basis, standing alone, for inferring a

does not itself impose any bargaining obligation, the Court of Appeals quite properly declined to decide the undecided NLRA issue prematurely, or broadly to invalidate the DWPA in order to assure that no bargaining obligation inconsistent with the NLRA is later imposed. Rather, as the court below recognized, the appropriate forum for determining in the first instance which of the two possible views regarding the interaction of the DWPA and the NLRA is most consistent with NLRA successorship principles is the forum prescribed for enforcement of the NLRA, the NLRB.

2. Petitioners' second contention is that the DWPA compromises an NLRA-protected "hiring freedom" of employers. Pet. 17. Although no such employer "right" (*id.*) appears on the face of the statute, petitioners maintain that under the *Machinists* preemption doctrine (*Machinists v. Wisconsin Employment Relations Board*, 427 U.S. 132 (1975)), the fact that Congress in enacting the NLRA regulated the hiring process to the degree of prohibiting discrimination based on union-related activity (§ 8(a)(3), 29 U.S.C. § 158(a)(3)) demonstrates an affirmative Congressional intention that other aspects of the hiring process be left to employer prerogative.

As the court below held, however, the DWPA is simply a variant of state employee-protective legislation and as such, under *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, is not preempted by the NLRA. Pet. App.

Congressional intention to override those rules. *Belknap v. Hale*, 463 U.S. 491, 501 (1983) (recognizing that the availability of a valid state law cause of action for breach of contract by striker replacements might require the Board to adjust the balance otherwise appropriate between the right of strikers to return to work after a strike and the ability of employers to function during a strike); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987) (holding a state severance pay statute valid despite the recognition that the statute could alter the balance of power in bargainng by "undercut[ting] an employer's ability to withstand a union's demand for severance pay."

10a-11a. In both *Metropolitan life, supra,* and *Fort Halifax, supra,* the employer argued, based on *Machinists,* that a state law requiring the payment of certain benefits was invalid because the law restricted the freedom of the parties to collective bargaining agreements to bargain freely with respect to such benefits. 482 U.S. at 20. In both instances, this Court concluded that the NLRA "is concerned primarily with establishing an equitable process for determining terms and conditions of employment," and addresses evils "entirely unrelated to local or federal regulation establishing minimum terms of employment." *Metropolitan Life,* 471 U.S. at 753, 754; *see also Ft. Halifax,* 482 U.S. at 20. For that reason, given the traditional "broad [state] authority under their police powers to protect workers within the State" (*De Canas v. Bica,* 424 U.S. 351, 356 (1976), *quoted in Metropolitan Life,* 471 U.S. at 756), this Court concluded that the NLRA collective bargaining system is intended to operate in tandem with that authority rather than to displace it in favor of an entirely free, unregulated labor market. *Fort Halifax,* 482 U.S. at 21.

The DWPA takes a novel approach to the problem of job security. But, both the mandated health benefits provisions involved in *Metropolitan Life* and the mandated severance benefit provision in *Fort Halifax* were innovative as well.[5] And, nothing in the Court's reasoning in

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[5] While we are not aware of any state laws that mandate continuity of employment over a change of employer, federal laws do so provide, and have never been thought inconsistent with federal labor policy. *Alaska Airlines v. Brock,* 480 U.S. 678 (1987) (upholding, against a challenge based on inseverability from a legislative veto provision, a provision in the Airline Deregulation Act of 1978 providing that covered carriers have a "duty to hire" employees furloughed by other covered carriers within ten years of the enactment of the statute); *see also, e.g.,* Bus Regulatory Reform Act of 1982, § 27; Interstate Commerce Act, 49 U.S.C. § 11347; Milwaukee Railroad Restructuring Act, 45 U.S.C. § 907; Regional Rail Reorganization Act of 1978, 45 U.S.C. § 588(f), 7975; Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C.

those cases suggests that the NLRA froze the states' authority to redress employment-connected harms to individual employees as of some time in the past.

To be sure, petitioners claim that hiring issues differ in some fundamental respect from aspects of the employment relationship such as the working conditions involved in *Metropolitan Life* and *Fort Halifax*. There is no legally pertinent difference, however, "based on the language, structure and history of the NLRA . . ." (*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989)). The NLRA does not regulate hiring any more or less than the Act regulates discharge, layoff, pay, hours, safety, or any of the other of a myriad of employment-related matters that do not involve the process of bargaining or determination of labor disputes. The *only* NLRA provision relating directly to hiring, § 8(a)(3) 29 U.S.C § 158(a)(3), *also* forbids union-based discrimination in discharge and working condition.[6]

Thus, petitioners' argument that "the antidiscrimination provisions of the NLRA are unintelligible unless one assumes that employers retain the right to make merit-based selection" (Pet. 19) cannot be squared with *Metropolitan Life* itself. Further, there are a panoply of state and federal laws that did not exist when the NLRA was enacted in 1935, and that regulate the employment selection and retention process (such as wrongful termination, employment discrimination and licensing laws), none of which have been thought inconsistent with the NLRA.

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§ 1004; Redwood National Park Expansion Act, 16 U.S.C. § 791; Urban Mass Transportation Act, 49 U.S.C. § 1609(c); Executive Order No. 12966 (1994). That Congress has repeatedly enacted such hiring protections for laid-off employees indicates that the Legislature see no fundamental incompatibility between such requirements and the National Labor Relations Act. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 755.

[6] Section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

To fill this glaring statutory gap, petitioners rely upon language in several of this Court's NLRA cases, including one successorship case, which refer to the "right" of employers to choose their employees. Pet. at 18-19. In the cases cited however, as well as others expressing similar concepts, it is always apparent in context that the Court intended only to describe the limited reach of the NLRA itself, not to confer a federally *protected* right in employers to free rein in the hiring process that preempts state law to the contrary. *See e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 40 ("the successor is under no obligation to hire the employees of its predecessor"); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280 n.5 (1972) ("the Board has never held that [the NLRA] itself requires that an employer who submits the winning bid for a service contract . . . be obligated to hire all of the employees of the predecessor."); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 264 (1974) (quoting the above language of *Burns*); *id.* at 262, 264 (using the term "right" when making the same point about the limited nature of the *federal* regulation of the hiring process contained in the NLRA.). Under these cases, employers have, with respect to hiring as with respect to other employee-protective regulation, only the "right" to be free of regulation *by the NLRB*, except insofar as section 8(a)(3) (or any other specific provision of the statute) applies, not the "right" to enjoy a wide, federally-assured "no-law" area of absolute freedom.

Finally, *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) (Pet. 22-23), certainly creates no circuit conflict with regard to the Court of Appeals' *Metropolitan Life* holding in this case. The statute involved in *Chamber of Commerce* bears no resemblance whatever to the DWPA (which, as noted (p. 4, *supra*), the Petition concedes is unique). The *Chamber of Commerce* statute did *not* concern any neutral, across-the-board hiring limitation, but rather concerned a statute

that interfered in the bargaining process directly, by imposing upon the parties to collective bargaining negotiations varying wage and benefit provisions "developed by averaging the bargains struck by other employers and employees." 64 F.3d at 503. Here, the statute has no possible impact whatever on the strategy or outcome of negotiations. *See* n. 4, *supra*.[7]

3. *Petitioners' Other Arguments*: (a) The contractors maintain that even if the Court of Appeals was otherwise correct, the judgment below should be reversed because the DWPA cannot be deemed invalid "to the extent that the DWPA requires employers to retain supervisors in supervisory positions without voiding the entire statute." Pet. App. 30a; Pet. 24-26. No reason is suggested why certiorari should be granted to review this case-specific issue, and none exists.

The argument is, in any event, "inexplicabl[e]" and "meritless." Pet. App. 14a (Sentelle, J., dissenting). Under well-established principles, courts "refrain from invalidating more of a statute than is necessary." *Alaska Airlines, Inc. v. Brock, supra*, 480 U.S. at 684. "Unless it is evident that the Legislature would not have enacted those provisions that are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 101, 108-109 (1976); *Immigration & Naturalization Service v. Chadha*, 463 U.S. 919, 931-932

[7] As the Court of Appeals noted (Pet. App. 9a-10a), employers, whether successors or otherwise, are *prohibited* by the NLRA from avoiding unionization through the tactic of stacking the workforce against the union. 29 U.S.C. § 158(a)(3); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Systems Management, Inc.*, 292 NLRB 1075 (1975); *Shortway Suburban Lines*, 286 NLRB 323 (1987); *Love's Barbeque*, 245 NLRB 78 (1979). Thus, the NLRA does not preserve from interference any employer right of self-help with respect to avoiding a successor's obligation to bargain collectively that parallels the freedom from regulation once bargaining begins at issue in *Chamber of Commerce*.

(1983); *Gray v. United States*, 499 A.2d 815, 821-830 (D.C. 1985).[8]

The District of Columbia has made its legislative intent clear with respect to preserving statutes by enacting a generic severability law, codified as D.C. Code § 49-601:

> (a) [I]f any provision of any act of the Council of the District of Columbia or the application thereof to any person or circumstance is held to be unconstitutional or beyond the statutory authority of the Council . . . or otherwise invalid, the declaration of invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application. . . .

See RDP Development Corp. v. District of Columbia, 645 A.2d 1078, 1082 n.18 (D.C. 1994) (applying the generic severance provision.). There is no doubt that the DWPA can be given meaningful effect without any application to supervisors. As noted (p. 3, *supra*), the very reason respondent did not apepal the supervisor holding is that the district court's supervisor holding af-

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[8] Petitioners suggest that *United States v. National Treasury Employees Union (NTEU)*, 115 S. Ct. 1003 (1995), changed the law of severability so as to broadly preclude partial invalidation of a statute as applied to particular circumstances. Pet. 25-26. In *NTEU*, however, the statute was declared invalid as to a "vast majority" of speech covered by the statute (115 S. Ct. at 1015), while here the statute remains fully valid with regard to almost all the covered individuals. Further, in *NTEU*, unlike here, there was no applicable severance clause (*id.* at 1024 (O'Connor, J., concurring in the judgment and dissenting in part)); there were "inconsistent signals" from Congress concerning its likely intent should the statute be partially invalid (*id.* at 1019 n.26); and there was no "relatively simple" line between valid and invalid applications. *Id. NTEU* therefore establishes only that in some circumstances, none of which exist here, courts may find it necessary as a practical matter to invalidate a statute more broadly than the basis for invalidity itself justifies.

fects the application of the statute either minimally or not at all.[9]

(b) The contractors also assert that the Court of Appeals erred in rejecting their contention that the DWPA violates the constitutional prohibition on impairment of the obligation of contracts. As the Court of Appeals recognized, however, that clause only applies where there is an *existing* contractual relationship to be "impaired", and "the DWPA only requires contractors to *hire* their predecessors employees, not to *fire* their own employees." Nothing in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) or any other case supports the contractors' assertion that "laws . . . *creating* contractual obligations are just as violative of the Contracts Clause as those that diminish or eliminate contractual obligations." Pet. 28 (emphasis supplied).

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[9] The contractors suggest that a state legal rule exempting NLRA supervisors from a provision covering employees cannot be given effect because only the NLRB can determine whether individuals are or are not supervisors within the meaning of the NLRA (Pet. 25 n.12). The Court of Appeals properly held, however, that the rule of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), precluding state adjudication where the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably committed to NLRB adjudication as protected or prohibited by the NLRA, has no application here. Indeed, NLRA § 14(a), the provision assertedly violated by the application of the DWPA to NLRA-defined supervisors, is not enforceable by the NLRB, because it creates no unfair labor practice, and therefore *must* be adjudicable in court.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARSHA S. BERZON
(Counsel of Record)
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

BRUCE MILLER
ORRIN BAIRD
CAROL R. GOLUBOCK
1313 L Street, NW
Washington, DC 20005
Attorneys for Service Employees International Union, et al.

CHARLES F. C. RUFF
Corporation Counsel, D.C.
CHARLES L. REISCHEL
(Counsel of Record)
Deputy Corporation Counsel
Appellate Division
Office of the Corporation Counsel
One Judiciary Square
441 Fourth Street, NW
Washington, DC 20001
(202) 727-6252
Attorneys for District of Columbia, et al.